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No. 316

AUG 28 1958

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1958

WILL O. MURRELL, SR.

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

WILL O. MURRELL, JR.
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PETITION FOR WRIT OF CERTIORARI

Will O. Murrell, Sr., brings this petition for writ of certiorari and represents and shows as follows:

1. That the opinion of the court sought to be reviewed is the final judgment in that Certain Cause wherein petitioner, W. O. Murrell, Sr., was the appellant and United States of America was appellee, lately pending in the United States Court of Appeals for the Fifth Circuit. The said opinion is unofficially reported in Advance Sheet #2 of 253 F. 2nd 267. A copy of the opinion is hereto attached and Marked Exhibit "I."

2. The grounds on which the jurisdiction of the Supreme Court of the United States is invoked, is that the United States

Circuit Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by the lower courts as to call for an exercise of this court's power of supervision.

a. The date of the judgment sought to be reviewed, is March 19, 1958, and was entered on same date. (Record Page 12). The opinion was filed March 19, 1958. (Record Page 10-11)

b. The date of filing petition for re-hearing was April 9, 1958. (Record Page 13). The re-hearing was denied April 29, 1958. (Record Page 23)

c. This Honorable Court extended time within which to file this petition for certiorari by order of this Honorable Court dated July 1, 1958 to and including August 28, 1958.

d. Statutory provisions believed to confer on this court jurisdiction is by reason of title 28, paragraph 347, section "a" of United States Code Annotated, Page 359:

"In any case-- in a court of appeals--it shall be competent for the Supreme Court of the United States upon petition of any party, thereto, --, to require by certiorari, --, after judgment or decree of the lower court that the cause be certified to the Supreme Court for determination by it, with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error."

3. The questions presented are:

a) Whether or not *a person not in contempt* but summarily adjudged so, upon mere payment of a fine ordered

by the court, is precluded from having a review, by appellate court, as to whether the conduct was contemptious,

Where the case in which the alleged contempt is still pending, motion for a new trial undisposed of, and the final determination of that case will inevitably be affected by ruling of the appellate court, or

Where the alleged contemnor is an attorney at law and such judgment is a deterrent or bar to admission to practice in other courts or his admission to American Bar or other bar associations, or

Where under the Florida Integrated Bar rule additional punishment is eminent, or

Where to do otherwise, it would allow the lower court to compound the error at appellant's expense, which course of conduct does not comport with our standards of law enforcement,

and is contrary to the doctrine lay down by the Supreme Court of the United States in the case of *Fishwick* v. *United States*, 329 U.S. 211-213, 91 Law Ed. 196?

b.) Whether or not a person *not in contempt of court* but summarily adjudged so is deprived of appellate review, offends against the fifth and fourteenth amendments of the Constitution of the United States?

c.) Whether or not the mere payment of a fine, wrongfully imposed for alleged contempt by a trial court renders an appellate review moot?

4. A concise statement of the case is as follows:

Will O. Murrell, Sr., petitioner, was the defendant in a civil case brought by a plaintiff, in the United States District Court, Southern District of Florida, the case being No. 3193-Civil-J, where the plaintiff there, and the petitioner-defendant, appeared as litigants in their own proper persons.

Murrell, Sr. was on the witness stand, and on cross-examination, was propounded the following irregular, ambiguous and ambulatory question:

> "Now during the course of the case, you told me how important it was to you to keep from being disbarred many, many times, didn't you, and the reason was not only you wanted to save your professional life but because you were afraid that the Civil Communications Commission would deny your right to a television station in Orlando?"

In answer to the question as propounded, the Petitioner herein replied:

> "*That* is a lie."*

Whereupon the Trial Court forthwith adjudged Murrell, Sr. guilty of a criminal contempt and ordered him into the custody of the Marshal (Record Page 20) until the sum of $100.00 was paid (Record p. 20).

5. The basis of jurisdiction of the lower court (United States District Court, Southern District of Florida), a civil action, was bottomed upon the amount in controversy ex-

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* Italics Ours.

ceeding the sum of $3000.00, exclusive of interest and costs and diversity of citizenship between plaintiff and the defendant; the Defendant being a resident of Florida and the Plaintiff a resident of the state of Georgia. It was in that case that the "alleged" contempt was committed and the judgment of the United States District Court of the Southern District of Florida adjudging petitioner in contempt and imposing upon petitioner the fine or imprisonment was entered. (Record Page 1-2) Jurisdiction of the Appellate Court (United States Court of Appeals for the Fifth Circuit) was founded upon the order of punishment (Record Page 1-2) because it is in itself a final order appealable as in other criminal cases. (Duell v. Duell. CA 1949, 178 F 2nd 683; Title 18, Rule 42, Criminal Contempt U. S. C. A. 494) It was the United States Court of Appeals for the Fifth Circuit to which petitioner Will O. Murrell, Sr. appealed, seeking a review of the judgment of the United States District Court for the Southern District of Florida.

6 (a) In argument we will first demonstrate conclusively *there was no contempt*. It is to be noted that the basis of the contempt action by the trial court was solely the answer of petitioner to the question, which elicted the answer from Murrell, then a witness in his own behalf, to wit:

A. *That* is a Lie.

The word "lie" properly defined and as used comes from Webster's New [redacted] Century Dictionary page 1044:

lie, n, 1. a false statement or action especially one made with intent to deceive

2. *Anything that is ment to give a false impression*

The trial judge seemingly allergic to the word failed to recognize that it is neither profane, vulgar, obscene or a curse word. *It was not prefixed by any epithet*, and is spoken in

common parliance daily; appears in newspapers, cross-word puzzles; a word about which lyrics and songs are written; it was used by Shakespear and other great authors in highly valued literature. It could be held to be contempt, no more than its synonyms, fib, falsehood, story, misrepresentation or untruth. Any litigant has the right to deny the truthfulness of any statement.

The Question propounded was more contemptious than the answer.

Moreover upon re-reading the question and answer, it is manifest the word challenged only the irregular, ambiguous, and ambulatory, disjunctive phrases, clauses and the subject of these connecting statements contained in what purported to be a question. It was directed only to the phraseology and cast no reflection upon the court, nor did it challenge the character or morals of any one. It is therefore manifest there was no contempt.

b) The record further discloses that in the original litigation of *White* v. *Murrell,* where the alleged contempt was committed, that petitioner's motion for a new trial though filed May 31, 1957 is still pending, and undisposed of and that the Trial Judge took the matter under advisement and deferred his ruling thereon (See Clerk Cerificate record Appendix I Page 18). It therefore cannot be questioned that the determination of this case will affect the right and liabilities of petitioner, and the pending litigation before the Trial Court all of which is apparent by the grave concern of the Trial Court in withholding a rule then and now.

c) That petitioner is an attorney at law admitted to practice before the Supreme Court of the United States is a matter of record of which this honorable court takes judicial notice –

This petitioner like all attorneys desires to apply for admission to the bar in Court of Appeals for the District of Co-

lumbia, or American Bar Association. He would be required to furnish personal statement of applicant for admission to practice. Questions 11 and 12 of the standard form personal statement (attached as Appendix II here) relate to conduct as a member of the bar.

It is perfectly evident that the agencies who thoroughly seek out the information for the courts would oppose petitioner's admission to the bar of another court, or Bar Association, of which there are many and thereby effect the right of petitioner to further pursue his profession.

d) In the state of Florida we have what is known as the *Integrated Bar,* a rule promulgated by the Supreme Court of our state. Everyone has to belong to the Florida Bar and may be punished.

Our Supreme Court after adopting the canons of ethics of the American Bar Association, has now gone further to make *any* act of an attorney punishable (31 F.S.A. 706 Art 11). We are attaching hereto an excerpt from Art. 11 which shows petitioner to be subject to further punishment as an attorney-at-law for the alleged misconduct. (Exhibit III)

e) The standard of conduct even in our challenging time where a person *not in contempt* of court though summarily adjudged so, would be wrong, if it should allow any of the foregoing rights of the petitioner to be abridged or taken and it is morally wrong, to add to his money being taken - by denial of right of appeal. It is submitted that to allow the court to compound an error does not comport with our standards of law enforcement and it is contrary to the doctrines laid down by the Supreme Court of the United States. (*Infra*).

7. Our Constitution of the United States in the 5th and 14th amendments provides for the due processes. These rights are

precious and in a case such as the petitioner's here to allow them to be dissipated unknowingly by matter of procedure where even the best lawyers would not know that such matter might waive constitutional rights, the dismissal of the appeal comes very close to the denial of the due processes clauses of the 5th and 14th Amendments to our Constitution, which allow the defendant the right to be heard.

8. The Court of Appeals for the 5th Circuit dismissed the petitioner's appeal as moot. It based its decision upon the case of *St. Pierre* v. *United States* 319 US 41-43, 87 Law. Ed. 1199.

In that case, an old case, a writ of certiorari was granted and counsel was requested to discuss the question of whether or not the case was moot. The case was where a prisoner had served his sentence and nothing was to be gained by passing upon the subject matter, there was no litigation pending, so the Supreme Court of the United States ruled the serving of the sentence, under the circumstances, rendered the case moot. We have no quarrel with this case but believe the instant case like the *Fishwick* case (*Infra*) differs because of the matters still pending and those to follow.

We have attached as exhibit IV a respectable list of authorities holding that payment of fine does not render appeal moot, for the convenience of the court.

CONCLUSION

The petitioner having clearly demonstrated; there is litigation pending and his rights would be vitally affected by allowing the lower appellate court's dismissal to stand, that petitioner will be subject to further deterrants and penalties in his profession, and subject to further prosecution under the Florida Integrated Rule, and that the court should not allow the Lower Court to compound the trial court's error, at the expense of petitioner and it would offend against all good morals.

It is submitted therefore, petitioner's petition for certiorari should be granted.

Respectfully submitted.

/s/ Will O. Murrell, Jr.

16 So. Newnan St.
Jacksonville 2, Florida

Counsel for the Petitioner

Aug. 27, 1958.

EXHIBIT I

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16772

W. O. MURRELL, SR.,

Appellant.

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(March 19, 1958)

Before HUTCHESON, Chief Judge, and BORAH and TUTTLE, Circuit Judges.

PER CURIAM: On May 24, 1957, appellant, defendant in a civil action, was adjudged guilty of contempt and ordered to pay a fine of $100 on or before May 27th, and he did so. On May 31, three days after the satisfaction of the judgment by payment of the fine and rendered the cause moot, appellant gave notice of appeal.

EXHIBIT I

The United States, pointing this out, urges upon us that the appeal must be dismissed.

We agree, and, on the authority of *St. Pierre vs. United States*, 319 U.S., 41, it is ORDERED that the appeal be, and it is hereby DISMISSED.

A true copy *Edward W. Wadsworth*
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

(Seal)

By _____
Deputy

New Orleans, Louisiana

EXHIBIT NO. II

Excerpt from Standard Form Application.

PERSONAL STATEMENT OF APPLICANT FOR ADMISSION TO PRACTICE

11. Have you ever been suspended or disbarred from practice anywhere or have you received any reprimand pertaining to your conduct or fitness as a member of the bar? (Give information in detail.)

12. State any other matter which may tend to reflect adversely upon your fitness as a member of the bar. (If none, answer "None.")

EXHIBIT III

Excerpt from Integration Rule, etc. of the Florida Bar.

31 FSA 706 –

Article XI. DISCIPLINE

2. This Court has heretofore adopted and approved a code of ethics governing judges and attorneys and rules governing the conduct of attorneys in Florida, but does not undertake by such code and rules or by the present rules to promulgate a code governing all causes for discipline. The enumeration here of certain categories of misconduct as constituting grounds for discipline shall not be deemed to be all-inclusive, nor shall the failure to specify any particular act of misconduct be construed as a tolerance thereof by this Court.

EXHIBIT IV

RESPECTABLE LIST OF AUTHORITIES HOLDING THAT PAYMENT OF FINE DOES *NOT* RENDER APPEAL MOOT

Alabama. – *Johnson* v. *State* (1911) 172 Ala 424, 55 So. 226, Ann Cas 1913E 296.

California. – *People* v. *Chamness* (1930) 109 Cal App Supp 778, 288 P 20; *Dreher* v. *Superior Ct.* (1932) 124 Cal App 469 12 P (2d) 671.

District of Columbia. – *District of Columbia* v. *Gardiner* (1913) 39 App DC 389.

Indiana. – *State ex rel. Lopez* v. *Killigrew* (1931) 202 Ind 397, 174 NE 808, 74 ALR 631, stated supra, III b.

Massachusetts. – *Com.* v. *Flecknet* (1896) 167 Mass 13, 44 NE 1053.

Minnesota. – *State* v. *Chicago G. W. R. Co.* (1914) 125 Minn 332, 147 NW 109.

New York. – *Barthelemy* v. *People* (1842) 2 Hill 248; *People* v. *Marks* (1909) 64 Misc 679, 120 NYS 1106 (where fine was paid under protest); *Re Hershey Farms* (1941) 175 Misc. 641, 24 NYS (2d) 163 87 L ed 1222 (where the fines were paid under protest).

Ohio. – *Johnson* v. *State* (1890) 4 Ohio CC 524, 2 Ohio CD 687.

Pennsylvania. — *Com.* v. *Barbono* (1914) 56 Pa Super Ct. 637.

Washington. — *State* v. *Winthrop* (1928) 148 Wash 526, 269 P 793, 59 ALR 1265.

Canada. — *Re Justices of York & Peel* (1863) 13 UCCP 159; *Rex* v. *Tucker* (1905) 10 Ont L Rep 506, 6 Ont Week Rep 533; *Rex* v. *Talbot* (1931) 43 BC 485, 55 Can Crim Cas 364 (1931) 3 DLR 676

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UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 316

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UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On May 24, 1957, petitioner was adjudged guilty of contempt of court (R. 2) and fined $100 for contempt in the presence of the court by reason of his conduct while testifying as a defendant in a civil action. This adjudication was clearly one of criminal contempt and not to vindicate rights of the plaintiff in the civil action. While the order of contempt apparently bears the district court number of the civil case out of which the contempt action arose (cf. R. 2 and R. 19), it recites that the court, in its finding of contempt, was acting pursuant to and under the au-

thority of Rule 42(a) of the Federal Rules of Criminal Procedure (R. 1). Petitioner has proceeded, in his arguments for appellate review, on the assumption that the adjudication was one of criminal contempt (R. 3, 4, 14; Pet. 4-5).

The Court of Appeals dismissed an appeal by petitioner on March 19, 1958 (R. 10, 12). A petition for rehearing was denied on April 29, 1958 (R. 23). On June 30, 1958, petitioner applied to this Court for an extension of time within which to file a petition for a writ of certiorari. On July 1, 1958, Mr. Justice Black signed an order extending the time for filing the petition for a writ of certiorari to, and including August 28, 1958. The petition was filed on that day.

Petitioner had 30 days from April 29, 1958 within which to file his petition for a writ of certiorari or to apply for an extension of time. Rules 22(2) and 34(2) of the Rules of the Supreme Court; Rule 37(c) of the Federal Rules of Criminal Procedure. His application for extension presented on June 30, 1958, the 62nd day, was out of time and therefore the order of July 1, 1958 was ineffective to confer jurisdiction. See *Carleton Screw Products Co.* v. *Fleming*, 317 U.S. 634, discussed in Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (Revised by Wolfson and Kurland, 1951 ed.), Section 415, p. 829, fn. 4. See, also, *Overfield* v. *Pennroad Corp.* (order of Mr. Justice Burton vacating prior order of extension) discussed *ibid.*, Appendix B, p. 946, fn. 19.

It is therefore respectfully submitted that the petition for a writ of certiorari is out of time.

J. LEE RANKIN,
Solicitor General.

SEPTEMBER 1958.

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